

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF PUBLIC UTILITIES

)
Petition of Massachusetts Electric Company)
Pursuant to G.L. c.164, § 76 and) D.P.U. 96-025
220 C.M.R. § 1.00 et seq. for Review of its)
Electric Industry Restructuring Proposal)
)

REPLY BRIEF OF
THE COMPETITIVE POWER COALITION
OF NEW ENGLAND, INC.
ON
RESTRUCTURING SETTLEMENT AGREEMENT

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December 17, 1996

The Competitive Power Coalition of New England, Inc. ("CPC") submits this reply brief concerning the Restructuring Settlement Agreement jointly sponsored by the Attorney General, New England Power Company ("NEP"), Massachusetts Electric Company and Nantucket Electric Company (collectively, "Mass Electric"), and several other parties, filed with the Department in this docket on October 1, 1996 (the "Settlement Agreement").

All of the parties to this proceeding agree that the Settlement Agreement is an important step in restructuring the electric utility industry in Massachusetts. It is also apparent that the Settlement Agreement enjoys broad support. Nevertheless, even the Agreement's signatories agree that regardless of who favors the Agreement, this Department must exercise its responsibility to reach its own conclusions on whether it is consistent with Department precedent and with public policy. See, for example, Attorney General's Initial Brief, 5 (Dec. 17, 1996).

As CPC observed in its initial brief, the Settlement Agreement generally is in keeping with this Department's efforts in D.P.U. 95-30 and 96-100, the General Laws and public policy. One aspect of the Agreement (apart from its proposed standards of conduct) nevertheless runs contrary to statute, this Department's precedents and public policy: the financing approvals that NEP and Mass Electric request in § V(D)(4) and Attachment 13 to the Agreement. CPC demonstrated in its initial brief that the evidence warrants findings by this Department that § V(D)(4) and Attachment 13 are not essential to the objectives set forth in

D.P.U. 95-30 and 96-100, nor are they necessary to accomplish the ends of the Settlement Agreement itself. Indeed, even the Agreement's principal signatories, NEP and Mass Electric, concede that some of the more troubling aspects of § V(D)(4) and Attachment 13 are completely unnecessary: NEP now disavows any intention, for example, of making unlimited borrowings against the amounts it will receive from the Variable Component of its Contract Termination Charge. See Initial Brief of NEP and Mass Electric, 31 (Dec. 17, 1996).

No matter what NEP professes, the language of § V(D)(4) and Attachment 13 is deliberately broad and sweeping. Nowhere do these provisions limit the amount, means or purposes of NEP's future borrowings. The approvals also are deliberately final: the Division of Energy Resources ("DOER"), a signatory to the Agreement, states that with the approvals granted in § V(D)(4) and Attachment 13, "NEP will be able to grant a security interest in the 'then current value' of the contract termination charges" - - both the Fixed Component and the Variable Component -- "without having to go before the Department for further approval."

Initial Brief of DOER, 12 (Dec. 17, 1996) (emphasis added).

According to NEP and Mass Electric, "the Settlement makes every effort to accord finality to its terms and to the Department's action in this case." Initial Brief of NEP and Mass Electric at 26 (emphasis added). Simply put, NEP and Mass Electric want a blank check, with no Department second thoughts.

Of all of the parties who participated in the Department's hearings on the Settlement Agreement, only NEP/Mass Electric and

DOER have addressed CPC's criticisms in their initial briefs. In their brief, NEP and Mass Electric accuse CPC of attempting to "recalibrate [the] overall balance" of the Settlement Agreement, merely to "improve the position of power suppliers beyond their contractual entitlements to the detriment of the secured creditors" or to "limit[] the financial flexibility of the Company or its ability to renegotiate [its power supply] contracts." Initial Brief of Mass Electric and NEP at 5.¹ These views stem from the mistaken assumption that the Department's only alternative to § V(D)(4) and Attachment 13 is the creation of a trust mechanism, such as the one proposed by Wheelabrator Environmental Systems.² While a trust is one way to cure the statutory and public policy objections to § V(D)(4) and Attachment 13, it is not the only cure. Other steps short of a trust include a limitation on NEP's ability to pledge or assign variable charges, see Attachment 1 to CPC's Initial Brief, or a postponement of any financing approval (and related pledges or assignments) until NEP presents its precise plans for divestiture and refinancing.

None of the Department's real alternatives to § V(D)(4) and Attachment 13 -- the only alternatives described in CPC's initial brief -- "improves" the credit position of power suppliers. A postponement of any financing approval leaves all of NEP's creditors -- bondholders and power suppliers alike -- in the positions they are today. CPC's alternative limit on NEP's

¹ DOER's criticisms are in the same vein. See Initial Brief of DOER at 13.

² See Initial Brief of Mass Electric and NEP at 31 (asserting that CPC wishes to divert access charge funds earmarked for NEP's power suppliers to "a separate fund").

ability to pledge or assign variable charges merely prevents NEP from giving away to its bondholders or refinancing lenders even more than the first claim on NEP's assets that they enjoy today, all of the proceeds from asset divestiture, and all of the Fixed Component of NEP's lucrative Contract Termination Charge.³ NEP's power suppliers would not gain anything from either of CPC's proposals; they merely preserve present rights.

NEP and Mass Electric are nevertheless correct on one point: CPC's proposals initially would limit NEP's financial flexibility as it begins divestiture and moves toward its post-divestiture businesses. These limits, however, are only those that M.G.L. c.164, §§ 14 and 17A already place upon NEP's financing activities. These limits certainly would not hamstring the companies in later filings with this Department. Given the complete absence of detail in the Settlement Agreement about (a) how NEP will undertake divestiture, (b) the interim arrangements necessary for divestiture to proceed,⁴ (c) who will receive the proceeds from NEP's asset sales (will it be existing bondholders, or will it be NEP's sole shareholder, New England Electric System?), (d) NEP's businesses following divestiture, and (e)

³ On page 13 of its initial brief, the DOER observes that the "[p]ublic interest does not require that the rights of creditors be improved during the restructuring process." One cannot square this observation with the substantial additions that the Settlement Agreement would make to the collateral now enjoyed by NEP's bondholders.

⁴ As CPC pointed out in its initial brief, NEP agreed to a restructuring plan in Rhode Island that guaranteed divestiture of at least 15% of its generating assets, without raising any issue of bondholder consent. This suggests that consent depends on the structure and amount of divestiture. Further, as Wheelabrator Environmental Systems observed in its initial brief, NEP might be able to avoid obtaining the consent of its bondholders by agreeing to turn over to the bondholders the entire proceeds of a fair market sale of any assets that are subject to the bondholders' lien. See CPC-1, 99-101.

NEP's financing needs following divestiture, it is entirely proper for this Department to continue, for the present, its existing oversight over NEP's financial activities. Anything less would be an abdication of this Department's responsibilities under §§ 14 and 17A.

CONCLUSION

NEP and Mass Electric's request for approval of § V(D)(4) and Attachment 13 of the Settlement Agreement should be rejected under c.164, §§ 14 and 17A as premature and not supported by the record. This Department should reject these portions of the Settlement Agreement, while giving NEP and Mass Electric permission to file for financing approvals if and when they are necessary. Alternatively, this Department should approve the Offer of Settlement only if § V(D)(4) and Attachment 13 of the Settlement Agreement are amended in the form set forth in Attachment 1 to CPC's Initial Brief in this proceeding.

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CERTIFICATE OF SERVICE

I hereby certify that on December __, 1996, I caused the Reply Brief of the Competitive Power Coalition of New England, Inc. to be served by regular mail to all parties on the service list in this proceeding.

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